David Nied (SBN 136413)
Allison M. Dibley (SBN 213104)
Anne E. Smiddy (SBN 267758)
AD ASTRA LAW GROUP, LLP
582 Market Street, Suite 1015
San Francisco, CA 94104
Telephone: (415) 795-3579
Facsimile: (415) 276-1976
dnied@astralegal.com
adibley@astralegal.com
asmiddy@astralegal.com

Attorneys for Plaintiff and Counter-Defendant
MUSIC Group Macao Commercial Offshore Limited

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO DIVISION)

MUSIC GROUP MACAO, COMMERCIAL OFFSHORE LIMITED, a Macao entity, Plaintiff, v. DAVID FOOTE, an individual, Defendant. AND RELATED CROSS-CLAIMS.	Case No. 3:14-CV-03078-JSC **PLAINTIFF MUSIC GROUP MACAO COMMERCIAL OFFSHORE LIMITED'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT** **Complaint Filed:** July 7, 2014 **First Amended Cmplt. Filed:** July 8, 2014 **Judge:** Magistrate Judge Jacqueline Scott Corley **Date:** June 4, 2015 **Time:** 2:00pm **Place:** Courtroom F – 15th Floor **Trial Date:** October 19, 2015

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

PLEASE TAKE NOTICE that on **June 4, 2015**, at **2:00 p.m.**, or as soon thereafter as the matter can be heard, in the courtroom of the Honorable Jacqueline Scott Corley located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiff, Music Group Macao, Commercial Offshore Limited ("Music Group") will, and hereby does, move for an order granting Music Group leave to file its Second Amended Complaint ("SAC") and ordering that the SAC submitted with this motion be deemed filed.

The motion is based on the Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declaration of Allison M. Dibley in Support, Music Group's SAC, the Proposed Order, the files and records of this action, and any additional material that may be elicited at the hearing of this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Music Group seeks leave to file its SAC pursuant to Federal Rule of Civil Procedure 15(a). Music Group's SAC, attached as Exhibit A, adds a claim for breach of fiduciary duty and additional factual allegations relating to Music Group's previously asserted claims against Defendant David Foote. Music Group's SAC does not prejudice Mr. Foote because the additional cause of action will not require additional extensive discovery, and fact and expert discovery does not close until July 24, 2015.

II. STATEMENT OF FACTS

Music Group filed this lawsuit on July 7, 2014. Following the initial Case Management Conference, the court set the following Pre-Trial deadlines: (1) deadline to complete Court-sponsored or private mediation: March 30, 2015; (2) deadline for primary expert disclosures: May 1, 2015; (3) deadline for rebuttal expert disclosures: May 29, 2015; (4) expert and fact discovery cut-off: July 24, 2015; and (5) deadline for hearing dispositive motions: August 27, 2015. The parties agreed to extend the deadline for expert disclosures to May 15, 2015, with rebuttal expert disclosures due June 12, 2015.

Music Group seeks to amend the First Amended Complaint to include an additional cause of action for breach of the fiduciary duty of care. The claim will not require additional extensive discovery because it is based on facts related to the initial causes of action or within the knowledge of Mr. Foote. Mr. Foote is not prejudiced by the amendment because fact and expert discovery does not close until July 24, 2015.

Due to the extensive loss of data and significant turnover of personnel in the Information Technology ("IT") and Information Systems ("IS") departments following the cyber attack at issue in this case, Music Group had extreme difficulty in locating and producing documents. Following the review of recovered emails, and the deposition Mr. Foote on March 5, 2015, Music Group discovered additional facts supporting the new claim and factual assertions.

III. ARGUMENT

A. Leave Should Be Granted to Amend the First Amended Complaint.

Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading "shall be freely given when justice so requires." The United States Supreme Court and the Ninth Circuit have repeatedly affirmed that leave to amend is to be granted with "extreme liberality." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (*citation omitted*); *see e.g. Foman v. Davis*, 371 U.S. 178, 182 (1962) (leave to amend should be freely given); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.") (*emphasis in original*). The primary factors relied on by the Supreme Court and the Ninth Circuit in denying a motion for leave to amend are "bad faith, undue delay, prejudice to the opposing party, and futility of amendment." *DCD Programs*, 833 F.2d at 186. None of these factors are present here.

As explained above, there is no prejudice to Mr. Foote because the proposed amendment does not require extensive additional discovery. Mr. Foote alleges that the agreement between the parties did not explicitly identify network security in his scope of work and that he was not responsible for network security. Music Group contends otherwise. Regardless of the interpretation of the contract, however, the facts that have come to light through discovery support a claim that at the very least Mr. Foote acted as an agent of Music Group. The SAC adds a claim for breach of fiduciary duty by Mr. Foote in his capacity as an agent of Music Group. This claim is based largely if not entirely on information that has already been disclosed through the discovery process. Moreover, since it is based on the relationship between Mr. Foote and Music Group, as well as Mr. Foote's conduct with third parties on behalf of Music Group, the facts are within the existing knowledge of Mr. Foote. To the extent Mr. Foote needs to take additional discovery on the underlying facts supporting the claim—and it does not seem that he does—the deadline to complete discovery is not until July 24, 2015. Thus, Mr. Foote will not be prejudiced by an order granting leave to file Music Group's SAC.

Moreover, Music Group offers its SAC in good faith and without undue delay. Since filing its original Complaint, Music Group has discovered new information regarding Mr. Foote's consultancy services and his role as standing Chief Technology Officer. Music Group has uncovered this information in the course of retrieving data lost as a result of the catastrophic cyber attack which took place on August 17, 2013, and in deposing Mr. Foote. Thus, the SAC is offered timely and in good faith, contains claims similar to those originally asserted, and does not prejudice Mr. Foote. Consequently, none of the factors on which courts deny motions for leave to amend are present here. The court should grant Music Group's motion for leave to amend the First Amended Complaint.

IV. CONCLUSION

For the reasons discussed above, Music Group respectfully seeks leave of this Court to file the proposed SAC.

Respectfully submitted,

Dated: April 28, 2015

AD ASTRA LAW GROUP, LLP

By ***/s/ Allison M. Dibley***
Allison M. Dibley
Attorneys for Plaintiff MUSIC Group Macao Commercial Offshore Limited

Exhibit A

David Nied (SBN 136413)
Allison M. Dibley (SBN 213104)Anne E. Smiddy (SBN 267758)
AD ASTRA LAW GROUP, LLP
582 Market Street, Suite 1015
San Francisco, CA 94104
Telephone: (415) 795-3579
Facsimile: (415) 276-1976
dnied@astralegal.com
whillger@astralegal.com
asmiddy@astralegal.com

Attorneys for Plaintiff MUSIC Group
Macao Commercial Offshore Limited

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO DIVISION)

MUSIC GROUP MACAO COMMERCIAL OFFSHORE LIMITED, a Macao entity,

Plaintiff,

vs.

DAVID FOOTE,

Defendant.

CASE NO.: 3:14-cv-03078 JSC

SECOND AMENDED COMPLAINT FOR DAMAGES; and
DEMAND FOR JURY TRIAL

The Hon. Mag. Judge J. Corley
Courtroom F, 15th Floor

Complaint Filed: July 7, 2014
First Amended Cmplt. Filed: July 7, 2014
Judge: Magistrate Judge Jacqueline Scott Corley
Trial Date: October 19, 2015

Plaintiff MUSIC Group Macao Commercial Offshore Limited alleges as follows:

THE PARTIES

1. Plaintiff MUSIC GROUP MACAO COMMERCIAL OFFSHORE LIMITED is a company incorporated in the foreign country of Macau with its registered offices at Rua De Pequim, No. 202A Macau Finance Centre, 9/J Macau ("MUSIC Group Macao" or "Plaintiff"). Plaintiff was formerly known as BEHRINGER Macao Commercial Offshore Limited. The company name was changed to MUSIC Group Macao Commercial Offshore Limited on March 4, 2011 by the Macau Trade and Investment Promotion Institute.

2. Upon information and belief, Defendant DAVID FOOTE ("Defendant") is a citizen of the state of California, and residing in San Francisco, California.

JURISDICTION

3. The Court has subject matter jurisdiction of the claim raised herein pursuant to 28 U.S.C. § 1332(a), given the diversity of the citizenship of the parties and the claim at issue exceeds $75,000. Personal jurisdiction over defendant David Foote is based upon his physical presence and domicile within the state of California.

INTRADISTRICT ASSIGNMENT

4. Intradistrict Assignment to the San Francisco division of this Court is proper, pursuant to Civil L.R. 3-2(c), as Defendant David Foote resides in San Francisco, California.

5. Venue is proper here, pursuant to 28 U.S.C. §§ 1391(b)(1), as Defendant David Foote resides in San Francisco, California.

GENERAL ALLEGATIONS

Defendant's Employment and Consultancy Agreement

6. Plaintiff is a supplier of professional audio music equipment. On or about January 1, 2007, Defendant was hired as an employee of BEHRINGER Holdings (Pte) Ltd Regional Operating Headquarters (ROHQ), as the Chief Technology Officer ("CTO"). BEHRINGER Holdings (Pte) Ltd (ROHQ) is the predecessor in interest of plaintiff MUSIC Group Macao Commercial Offshore Limited. Pursuant to an Employment Agreement, Defendant was responsible for the technology of the company and its subsidiaries.

7. On or about August 27, 2010, Defendant continued to work in a consulting role on a part-time basis for the Plaintiff. The terms of Defendant's consulting were negotiated between BEHRINGER Macao Commercial Offshore Limited (now doing business as Plaintiff MUSIC Group Macao Commercial Offshore Limited), and Defendant, and at least some of the terms were memorialized in writing via a Consultancy Agreement. The Consultancy Agreement between BEHRINGER Macao Commercial Offshore Limited and David Foote is attached hereto as Exhibit "A," hereinafter "Agreement." This Agreement was digitally signed by Defendant on September 20, 2012.

8. Defendant DAVID FOOTE expressly agreed to provide services as an independent contractor for the benefit of BEHRINGER (now doing business as plaintiff MUSIC Group Macao) and Plaintiff's affiliates or member companies, and held himself out as the Chief Technical Officer ("CTO"). Pursuant to the Agreement, as evidenced by the language of the Agreement, the circumstances surrounding the Agreement, and the conduct of the parties prior to the dispute, Defendant was responsible for Plaintiff's network infrastructure, which included network security. The agreed-upon services included without limitation high level strategic vision and guidance for Information Technology (IT) and Information Services (IS) projects, management and negotiation of external project relationships with a focus on SCM and ERP implementation and projects, management and guidance of IT and IS organizations, IT and IS budget, resource, and projection rationalization, and a "big picture" evaluation of all IS systems and personnel, including investigation and analysis of current systems that are in place as well as those that are not being utilized completely or properly, creation of a status report and gap analysis on the short falls, as well as a conclusive report of recommendations, and to meet with the Chief Operating Officer ("COO") and work on a strategic plan for the IS departments (collectively, hereinafter "IT Services"). [See, paragraph 2 of Exhibit "A"].

9. From 2010 until FOOTE was terminated in August 2013, every Music Group employee who worked on network security worked in one of the two departments that FOOTE managed. During FOOTE's tenure with Music Group under the Agreement (August 2010 through August 2013), Music Group did not have a Chief Information Officer, nor did it have a Chief Information Security Officer. There were no other executive or management-level employees who performed any job duties related to cyber security at Music Group other than those individuals who reported up the command chain to Foote. Under the circumstances, Foote was responsible for the cyber security of Music Group's IT infrastructure. Since FOOTE was responsible for these departments, network security rested on his shoulders. In addition, FOOTE agreed to, and did in fact, act as Plaintiff's agent as the *de facto* CTO for the company by, without limitation: (1) consulting with other officers on high-level strategy for MUSIC GROUP's IT and IS departments;

(2) signing agreements with third parties on behalf of MUSIC GROUP; and, (3) managing the IT and IS departments, including all of MUSIC GROUP's network security personnel.

10. Prior to signing the Agreement, FOOTE held himself out as a highly skilled professional in IT infrastructure and security. Plaintiff hired him specifically for this experience and expertise. Plaintiff relied on FOOTE to act as the *de facto* CTO, and to manage, plan, and strengthen its network infrastructure. Defendant's negligent actions in failing to provide the agreed-upon IT Services, and in failing to adhere to the standard of care that a reasonably careful CTO would use under similar circumstances, directly and proximately caused Plaintiff's damages, giving rise to the current causes of action.

11. Pursuant to the Agreement, Defendant agreed to indemnify and hold harmless BEHRINGER Macao Commercial Offshore Limited (now doing business as Plaintiff MUSIC Group Macao Commercial Offshore Limited) and its officers, agents, employees, successors and authorized assigns from and against any and all liabilities, damages, costs, losses, claims, demands, actions, and expenses (including reasonable attorneys' fees) arising in consequence of gross negligence or wilful misconduct or a breach of any term in the Agreement or gross negligence on the part of the Defendant in connection with the performance of his duties. [See, paragraph 14 of Exhibit "A"].

Cyber-Attack on Plaintiff's Computer Network Operations

12. On or about August 18, 2013, Plaintiff was the subject of a massive and malicious attack on their computer network and communications infrastructure. During the attack, Plaintiff's fundamental operations were entirely disrupted, including without limitation phone service, email, accounting, and data storage and retrieval. Restoration of operations is still underway.

13. Prior to the August 18, 2013, attack, Defendant was aware of deficiencies in the security of Plaintiff's computer network and in back-up systems that were to ensure data would be preserved on Plaintiff's computer network in the event of an outage or security breach. Defendant knew of specific problems with Plaintiff's global computer network, including failure to backup data, failure to securely maintain passwords, failure to update and modernize Plaintiff's software, hardware and firmware, and the general "disorganization" of the entire network. Defendant also

knew of at least one prior outage that occurred on or about June or July of 2013 on the global computer network of Plaintiff and knew Plaintiff's global computer network was at risk.

14. Despite knowing about these and other network issues, Defendant failed to perform his duties under the Agreement and failed to adhere to the standard of care in the industry, including providing management and guidance, providing status reports, and providing a strategic plan for Plaintiff's IS/IT departments to address the numerous problems with the network of which the Defendant was well aware.

15. On August 20, 2013, Plaintiff contracted with a third party service provider to restore operations of Plaintiff's network, determine the cause of the network failure, and to assist in implementing changes to Plaintiff's computer network to correct current shortcomings and address on-going and future needs of Plaintiff's computer network. During the third party's investigation, it was determined there was a complete failure to set up, organize, update, and maintain Plaintiff's network and as a result, security vulnerabilities were created that opened the system to attack, which could have otherwise been prevented but for Defendant's negligence and failure to perform under the contract. The third party contractor concluded that the network was in a continual state of decline for several years prior to the attack and that the network attack was directly caused by malicious users who desired to harm the organization and were able to do so because of certain pre-existing conditions. These pre-existing conditions included, without limitation, an unsecure network, unsecure systems, lack of a security framework, and the lack of meaningful network documentation and functioning data backup.

16. The August 27, 2010 Consultancy Agreement between the parties contains an Arbitration clause. [See, paragraph 18 of Exhibit "A"]. Plaintiff alleges here that the clause is fatally flawed in that there is no such entity called the "United States Arbitration Centre (USAC)" nor are there any "prevalent arbitration rules of the USAC". As such, there is no actual arbitration provider for the parties to submit this matter to, and no known arbitration rules that would govern the arbitration. It is thus proper for Plaintiff to proceed here, in federal court.

FIRST CAUSE OF ACTION

BREACH OF CONTRACT

17. Plaintiff repeats and re-alleges each of the allegations contained in paragraphs 1 through 16 of this Complaint.

18. On or about August 27, 2010, Plaintiff (by way of its predecessor company BEHRINGER) and defendant entered into a written contract, the Consultancy Agreement, with the terms as set forth in Exhibit "A". In sum, Defendant agreed to perform the IT Services under the Consultancy Agreement "faithfully and to the best of his ability," and to "devote such of his business time, energy and skill as may be reasonably necessary for the performance of his duties." In consideration for performance of the IT Services, Plaintiff agreed to pay Defendant a monthly sum in the amount of $5,000.00, with a 40 hours per month expected work schedule, with additional time beyond 40 hours per month to be determined on a case-by-case basis, at the rate of $125.00 per hour.

19. Plaintiff did substantially all that the Agreement required it to do. As detailed above, Defendant failed to perform the IT Services as required by the Agreement. Defendant's failure was the direct and proximate cause of Plaintiff's computer network vulnerabilities that allowed the attack of August 18, 2013 to take place, resulting in substantial economic losses to Plaintiff as well as damage to Plaintiff's relationships with its vendors, marketing and sales representatives, and customers.

20. As a result of Defendant's failure to perform under the Agreement, Plaintiff was damaged in an amount to be proven at trial, which amount is no less than $3.1M.

SECOND CAUSE OF ACTION

NEGLIGENCE

21. Plaintiff repeats and re-alleges each of the allegations contained in paragraphs 1 through 20 of this Complaint.

22. Defendant owed a duty of care to Plaintiff (as a successor company to BEHRINGER), in the performance of his obligations under the Agreement, and in the rendering of professional services pertaining to his specialized expertise in IT and IS infrastructure, as set forth

above. In addition, as Plaintiff's agent, Defendant owed Plaintiff a duty to act with reasonable care.

23. Defendant breached his duty of care to Plaintiff and was grossly negligent when he failed to perform his obligations under the defined services of the Agreement, and failed to adhere to the standard of care that a reasonably careful CTO would use under similar circumstances, including without limitation his failure to implement reasonable network security measures in the management and guidance of Plaintiff's IT and IS organizations.

24. Defendant's gross negligence in performing the promised IT Services was the proximate cause of numerous security vulnerabilities in Plaintiff's network, thereby allowing the attack of August 2013 to take place, and significantly prolonging Plaintiff's recovery efforts. This attack, as specified above, disrupted business activities and resulted in economic losses to the Plaintiff as well as damage to Plaintiff's relationships with its vendors, marketing and sales representatives, and customers.

25. As a proximate result of Defendant's gross negligence, Plaintiff was damaged in an amount to be proven at trial, which amount is no less than $3.1M.

THIRD CAUSE OF ACTION

EXPRESS CONTRACTUAL INDEMNITY

26. Plaintiff repeats and re-alleges each of the allegations contained in paragraphs 1 through 25 of this Complaint.

27. In the written Agreement, Defendant expressly agreed to indemnify BEHRINGER and its successors and authorized assigns, "from and against any and all liabilities, damages, costs, losses, claims, demands, actions, and expenses (including reasonable attorneys' fees) arising in consequence of gross negligence or wilful misconduct of the Consultant or a breach by the Consultant of any term herein or gross negligence on the part of the Consultant in connection with the performance of his duties." [See, paragraph 14 of Exhibit "A"]. As a successor to BEHRINGER, plaintiff MUSIC Group Macao Commercial Offshore Limited is entitled to the indemnity.

28. Defendant's gross negligence and failure to perform under the Agreement was a substantial factor of the resulting economic and non-economic damages to Plaintiff due to the

August 18, 2013 attack, including reasonable attorneys' fees, in an amount to be proven at trial, which amount is no less than $3.1M.

29. Defendant is required to indemnify Plaintiff MUSIC Group Macao under the terms of the Agreement for the foregoing losses and damages.

FOURTH CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY

30. Plaintiff repeats and re-alleges each of the allegations contained in paragraphs 1 through 29 of this Complaint.

31. Defendant acted as Plaintiff's agent as *de facto* CTO by, without limitation: (1) consulting with other officers on high-level strategy for Music Group's IT and IS departments; (2) signing agreements with third parties on behalf of the Company; and, (3) managing the IT and IS departments, including all of the Company's network security personnel. As such, Defendant acted on Plaintiff's behalf in strategizing, analyzing, planning, and managing Plaintiff's network infrastructure.

32. As Plaintiff's agent, Defendant owed Plaintiff a fiduciary duty to use reasonable care in the performance of his professional services pertaining to Plaintiff's network infrastructure. Defendant breached his fiduciary duty of care to Plaintiff by failing to act as a reasonably careful CTO would have acted in the same or similar circumstances.

33. Defendant's breach of his fiduciary duty was the proximate cause of numerous security vulnerabilities in Plaintiff's network, thereby allowing the attack of August 2013 to take place, and significantly prolonging Plaintiff's recovery efforts. This attack, as specified above, disrupted business activities and resulted in economic losses to the Plaintiff as well as damage to Plaintiff's relationships with its vendors, marketing and sales representatives, and customers.

34. As a proximate result of Defendant's breach of fiduciary duty, Plaintiff was damaged in an amount to be proven at trial, which amount is no less than $3.1M.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff MUSIC Group Macao Commercial Offshore Limited respectfully prays judgment and relief against David Foote as follows:

1. For general, compensatory, special and incidental damages, in an amount according to proof;

2. For the costs and expenses incurred in this action under 28 U.S.C. § 1920 and under Fed. Rules of Civil Procedure 54(d);

3. For reasonable attorney fees as provided for in the Agreement and/or as otherwise permitted by law;

4. For pre-judgment and post-judgment interest at a rate to be determined by the Court;

5. For such other and further relief as the Court may deem just and equitable.

Dated: April 28, 2015

AD ASTRA LAW GROUP, LLP

By ***/s/ Allison M. Dibley***
Allison M. Dibley
Attorneys for Plaintiff MUSIC Group Macao Commercial Offshore Limited

DEMAND FOR JURY TRIAL

Plaintiff MUSIC Group Macao Commercial Offshore Limited hereby demands a trial by jury of all issues in this case.

Dated: April 28, 2015

AD ASTRA LAW GROUP, LLP

By ***/s/ Allison M. Dibley***
Allison M. Dibley
Attorneys for Plaintiff MUSIC Group Macao Commercial Offshore Limited

Exhibit A

Exhibit A

CONSULTANCY AGREEMENT

BETWEEN

BEHRINGER Macao Commercial Offshore Limited

And

David Foote

THIS CONSULTANCY AGREEMENT is made on the 27^{th} of August 2010.

Between

(a) **BEHRINGER Macao Commercial Offshore Limited**, a company incorporated in Macau and having its registered office at Rua De Pequim, No. 202A Macau Finance Centre, 33410 Macau ("**BEHRINGER**") of the one part; and

(b) **DAVID FOOTE**, an individual residing at

____,
("**Consultant**"), of the other part.

Recitals:

(A) The Consultant has certain skills and abilities that may be useful to BEHRINGER in relation to BEHRINGER's technical operations from time to time; and

(B) The Consultant is an independent contractor willing to provide consultancy services to BEHRINGER as set out below.

Operative provisions:

1. Nature of Consultancy

The Consultant is, and shall at all times during the term of this Agreement, be deemed to be an independent contractor and not an employee of BEHRINGER.

2. Duties

The Consultant shall perform his obligations hereunder faithfully and to the best of his ability under the direction of the BEHRINGER CEO and acting COO. The Consultant shall devote such of his business time, energy and skill as may be reasonably necessary for the performance of his duties. Nothing contained herein shall require the Consultant to follow any directive or to perform any act which would violate any laws, ordinances, regulations or rules of any governmental, regulatory or administrative body, agent or authority, any court or judicial authority, or any public, private or industry regulatory authority.

The Duties will be as follows:
This is to be a big picture evaluation of all IS systems and personnel. Investigate and analyse the current systems that are in place as well as those that are not being utilized completely or properly. Create a status report, and gap analysis on the short falls that need to be looked at as well as a conclusive report of your recommendations moving forward.
Meet with the COO and work on a strategic plan for the IS departments.

Scope of engagement
* High level strategic vision and guidance for IT/IS projects
* Management and negotiation of external project relationships with focus on SCM and ERP implementation and projects
* Management/Guidance **of IT and IS organizations**
* IT/IS Budget, Resource and project rationalization

3. Term

This Agreement shall commence on 27^{th} of August and shall continue until such time that either party terminates this agreement by the giving of the requisite notice specified under Section 6.

4. **Fee**

Consultant shall invoice BEHRINGER on a monthly basis for services rendered during the contracted period each month. BEHRINGER shall pay to the Consultant based on the following agreement:

i) Consulting engagement primarily conducted remotely, with onsite travel arranged as needed

ii) $ 5K USD per month with monthly retainer, and 1 week (40 hours) expected work schedule

iii) Additional time beyond the 1 week minimum per month work schedule to be determined on case to case basis by mutual consent at will be paid at $125 an hour.

iv) Fees will be a transfer to Consultant's designated bank account. Consultant will provide an invoice to BEHRINGER by the 15th of the following month

5. **Expenses**

Long distance travel rates to include 50% of daily rate for travel time incurred. Travel expenses including food, lodging and transportation shouldered by the company at reasonable rates.

6. **Termination**

Without limitation, the Parties may terminate this agreement as follows:-

6.1 BEHRINGER may, by notice in writing, forthwith terminate this Agreement if the Consultant shall:-

(i) become of unsound mind;

(ii) is or becomes bankrupt or insolvent or unable to pay his debts when they fall due;

(iii) is guilty of gross misconduct or any serious or persistent breach of obligations in the provision of the services;

(iv) is convicted of any criminal offence (excluding a road traffic offence not imposing a custodial sentence);

(v) brings or is likely to bring BEHRINGER's name into disrepute;

(vi) has or will cause loss of goodwill to BEHRINGER Group;

(vii) breaches the confidentiality provisions set out herein; or

(viii) has been unable, refused or failed to provide any of the services for fourteen (14) days after being instructed by BEHRINGER to do so.

6.2 The Consultant may, by notice in writing, terminate this Agreement if BEHRINGER shall fail to pay the agreed Fee in full and on time.

6.3 Either party may terminate this Agreement by giving prior written notice to the other party. No notice period is required.

6.4 The Consultant acknowledges that no representations or promises have been made in connection with this Agreement or any other arrangement, plan or agreement between the Consultant and BEHRINGER concerning the grounds for termination or future operations, and that nothing contained herein or otherwise stated by or on behalf of BEHRINGER modifies or amends the right of the Parties to terminate the Consultant at any time, with or without cause.

7. **Confidential Information**

The Consultant agrees to treat as secret and confidential and not at any time for any reason to disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to BEHRINGER's technology, know-how, business plans, strategies, practices, employees, management or finances or any such information relating to a subsidiary, supplier, customer or client of BEHRINGER or of any other company under the BEHRINGER group of companies, where the information was received during the period of this Agreement and upon termination of this Agreement for whatever reason the Consultant shall deliver up to BEHRINGER all working papers, computer disks, CD-ROMS and tapes or other material and copies provided to or prepared by him pursuant either to this Agreement or to any previous obligation owed to BEHRINGER. This provision shall survive the termination of this Agreement.

8. **Intellectual Property**

8.1 Consultant shall promptly and fully disclose to the CFO any invention, improvement, discovery, process, formula, technique, method, trade secret, or other intellectual property, whether or not patentable, whether or not copyrightable made, conceived, developed, or first reduced to practice by the Consultant pursuant to this Agreement, either alone or jointly with others, while performing services hereunder.

8.2 Consultant warrants and undertakes that any intellectual property rights subsisting in or attaching to anything created by the Consultant in the course of providing the services shall belong to and vest in BEHRINGER absolutely to the fullest extent permitted by law. To such end Consultant shall, at the request and expense of BEHRINGER, execute all such documents and do such other acts as may in the opinion of BEHRINGER be necessary or desirable to vest any such intellectual property rights in BEHRINGER absolutely and Consultant hereby assigns by way of present assignment of future copyright all copyright in any copyright works produced or originated by Consultant in the course of providing the services.

9. **Non-Competition**

The Consultant acknowledges that duties to be performed give him the opportunity to have special knowledge of the BEHRINGER Group and their Confidential Information and the capabilities of the individuals employed by or affiliated with BEHRINGER and that interference in these relationships would cause irreparable injury to BEHRINGER. In consideration of this Agreement, the Consultant covenants and agrees that for a period of twelve (12) months from termination, the Consultant will not, without the express written approval of the Board of Directors of BEHRINGER, directly or indirectly, in one or a series of transactions, or enter into any agreement to, own, manage, operate, control, or otherwise engage or participate in, whether as a proprietor, partner, lender, director, officer, employee, joint venturer, lessor, agent, representative or other participant, in any business which competes with BEHRINGER. The Consultant acknowledges that the terms of this Section 9are reasonable and necessary for the protection of BEHRINGER, and that the scope and term of this Section 9 should not preclude the Consultant from earning a living with an entity that does not compete.

10. **Non-Solicitation**

During the term of this Agreement and for a period of six (6) months thereafter, the Consultant will not and will not cause another business or commercial enterprise to, without the express prior written approval of the Board of Directors of BEHRINGER, in one or a series of transactions, recruit, solicit or otherwise induce or influence any proprietor, partner, stockholder, lender, director, officer, employee, sales agent, joint venturer, investor, lessor, customer, consultant, agent, representative or any other person which has a business relationship with any member of the BEHRINGER Group or had a business relationship with any member of the

BEHRINGER Group to discontinue, reduce or modify such consultancy, agency or business relationship.

11. **Non-Disparagement**

During and after the Term of this Agreement, the Parties agree that they shall not make any false, defamatory or disparaging statements about the other party. For avoidance of doubt, the obligation owed by the Consultant to BEHRINGER hereunder shall extend to any member of the BEHRINGER Group, the officers or directors of BEHRINGER or any member of the BEHRINGER Group.

12. **Status and Tax Liabilities**

The Parties declare that it is their intention that the Consultant shall have the status of a self-employed person and shall not be entitled to any benefits, bonus or other fringe benefits from BEHRINGER and it is agreed that the Consultant shall be responsible for all income tax liabilities or similar contributions (including but not limited to value added tax) in respect of his fees and the Consultant agrees to indemnify BEHRINGER against all demands for any income tax, penalties, interest in respect of the Consultant's services hereunder and against its costs of dealing with such demands.

13. **The Consultant's Representations**

The Consultant hereby warrants and represents to BEHRINGER that he has carefully reviewed this Agreement and has consulted with such advisors as he considers appropriate in connection with this Agreement, and is not subject to any covenants, agreements or restrictions, including without limitation any covenants, agreements or restrictions arising out of the Consultant's prior employment which would be breached or violated by the Consultant's execution of this Agreement or by his performance of his duties hereunder.

14. **Indemnification**

Consultant shall indemnify and hold harmless BEHRINGER and its officers, agents, employees, successors and authorized assigns from and against any and all liabilities, damages, costs, losses, claims, demands, actions, and expenses (including reasonable attorneys' fees) arising in consequence of the gross negligence or wilful misconduct of the Consultant or a breach by the Consultant of any term herein or gross negligence on the part of the Consultant in connection with the performance of his duties.

15. **Personal Agreement**

This Agreement is personal between BEHRINGER and Consultant, and neither may sell, assign or transfer any duties, rights or interests created under this Agreement without the prior written consent of the other, such consent not to be unreasonably withheld. Nothing in this Agreement is intended to confer on any person who is not a party hereto (save for members of BEHRINGER Group) any right to enforce any terms of this Agreement pursuant to the Contracts (Rights of Third Parties) Act, Cap 53B.

16. **Variation Of Agreement**

No agreement or understanding varying or extending this Agreement shall be legally binding upon either party unless in writing and signed by both parties.

17. **Severability**

Whenever possible, each provision of this Agreement will be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held to be invalid, illegal or unenforceable in any respect under any applicable law or rule in any jurisdiction, such invalidity, illegality or unenforceability will not affect any other provision or any other jurisdiction, but this Agreement will be reformed, construed and enforced in such jurisdiction as if such invalid, illegal or unenforceable provision had never been contained herein. If any court determines that any provision of this Agreement is unenforceable and therefore acts to reduce the scope or duration of such provision, the provision in its reduced form shall then be enforceable.

18. **Governing Law and Dispute Resolution**

This Agreement is made under and shall be construed according to the laws of the United States. Any disputes arising out of or in connection with this Agreement shall be referred to the United States Arbitration Centre ("USAC") for arbitration. Arbitration shall be conducted in accordance with the prevalent arbitration rules of the USAC in effect at the time of application for arbitration. The arbitral award is final and binding upon both parties.

IN WITNESS WHEREOF, the parties hereto have set their hands as of the day and year first written above.

Signed by ______________________)
for and on behalf of)
BEHRINGER
Macao Commercial Offshore Limited)

Signed by David FOOTE, Consultant)

David R. Foote

Digitally signed by David R. Foote
DN: cn=David R. Foote, o=FBM Software, ou, email=david@fbmsoftware.com, c=US
Date: 2010.09.20 15:51:03 -07'00'